

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

September 26, 2001 Session

JAMES BURKS v. WILLIAMS TYPESETTING, INC.

**Direct Appeal from the Circuit Court for Bradley County
No. V-99-486 Lawrence H. Puckett, Circuit Judge**

Filed March 20, 2002

No. E2001-00252-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the employee was permanently and totally disabled. The employee appealed insisting the award should be fixed as a permanent partial award payable for a period of 400 weeks. The judgment of the trial court is affirmed as to the 100 percent award of permanent and total disability, the denial of attorney's fees on unpaid medical expenses and the commutation of a lump-sum award for payment of attorney's fees. The judgment is reversed as to allowing a credit against the total disability award and the commutation of benefits in favor of the employee. The case is remanded for the purpose of amending the judgment to allow additional temporary total benefits and for further hearing on the employee's application for commutation benefits.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part, Reversed in Part and Remanded

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, J. and BYERS, SR. J., joined.

Richard H. Winningham, of Chattanooga, Tennessee, for Appellant, James Burks.

Phillip E. Fleenor and Jane M. Stahl, of Chattanooga, Tennessee, for Appellee, Williams Typesetting, Inc.

MEMORANDUM OPINION

In this case the trial court found the employee, James Burks, totally and permanently disabled and ordered benefits to be paid until he reached sixty-five years of age pursuant to the provisions of Tenn. Code Ann. §50-6-207(4)(A)(i). The employee is dissatisfied with the award and has appealed

insisting his disability should be determined as a permanent partial disability award and not subject to termination at age 65 years. Several other issues are also being raised in connection with the total disability award.

Basic Facts

The employee was 59 years of age at the time of the accident and was a high school graduate. His work experience was limited to being a painting contractor (34 years) and an over-the-road truck driver. He began working for the defendant, Williams Typesetting, Inc., in 1996 and was severely injured on June 10, 1998, in the State of Indiana when his wife was driving the tractor-trailer and he was in the sleeping compartment of the cab.

As a result of the accident, he sustained the following injuries: (1) ruptured disc at two levels in his neck, (2) rotator cuff tear in left shoulder, (3) tear of a lumbar disc and (4) loss of use of his left eye. Prior to the accident, he had two heart attacks and suffered from emphysema.

After some period of time, he returned to work and attempted to drive but was unable to do so. Then his employer accommodated his limitations and restrictions by assigning him to lighter duty work in their "hand work department" where he could take a break when he wanted to and work the hours he was able to do. He testified that he works about twenty hours per week but has worked longer sometime. This change of position has resulted in reduced wages. Officials at the printing company testified he is a good worker and is good for the morale of the department. The company does not have a mandatory retirement age.

The employee also testified that prior to the accident he had an income from a beef jerky business which he started as a hobby but developed into a part-time job. After the accident, he said he still attempted to operate the business but was somewhat physically limited in doing the work that was required. The record is silent as to the amount of any income from this business either before or after the accident.

Several doctors testified by deposition. Their testimony indicated the combined medical impairment rating of the various injuries would be in excess of 50 percent to the body as a whole.

Dr. Dennis Lee Stohler, an orthopedic surgeon, treated Mr. Burks for his shoulder and lumbar disc injuries. He indicated he had a partial rotator cuff tear in his left shoulder for which he assigned a 9 percent medical impairment to the body as a whole and a tear of a lumbar disc for which he gave a 10 percent impairment to the body as a whole. He stated surgery was performed to correct the rotator cuff tear and a rigid brace was fitted to help the lumbar disc problem and that it did help relieve a lot of his left leg and hip pain. As to his ability to return to work, the doctor stated he could not go back to driving a truck but could do some type of work where he was not involved in exceeding certain lifting, etc. restrictions. He was of the opinion that he could work at a job where he could change positions frequently and work at bench level.

Dr. Scott D. Hodges, also an orthopedic surgeon, treated Mr. Burks for the ruptured discs in his neck. He testified this treatment resulted in surgery where three different discs were removed and he “took some of the bone out in between these discs and then fused it all together.” He was of the opinion the employee had a 15 percent impairment to the body as a whole from these injuries. He also said he could not return to his truck driving job because of loss of 30 to 40 percent of his neck rotation as the fusion had left a fair amount of stiffness in the neck. It was also stated that post-operative surgery caused rods to be placed in his neck and that this was permanent.

Dr. Robert W. Enzenauer, an ophthalmologist, treated the employee for a double vision problem caused by the accident. He testified the diagnosis was a condition known as complex strabismus of the left eye; that this condition was where the eyes were not aligned together and double vision results because the eyes are not looking at the same direction; that he performed surgery on the eye and was able to correct the problem to a certain extent; and that under the AMA guidelines he had lost the vision of the eye and would have a 24 percent impairment to the body as a whole from this injury. He said Mr. Burks was not blind in that eye but this was the way the guidelines rated the impairment for this condition. He opined he probably could still operate a private vehicle but could not qualify to drive a commercial vehicle.

Issues on Appeal

The employee contends the trial court was in error (1) in not finding permanent partial disability so the award would be paid out over a period of 400 weeks, (2) in providing for a credit of temporary total disability against the award, (3) in denying attorney’s fee on certain unpaid medical expenses, (4) in failing to award additional temporary total disability benefits, and (5) in failing to provide enough lump sum award so the employee could make capital improvements to his house and sideline business.

Standard of Review

We must review the issues of this case *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). However, *de novo* review does not carry a presumption of correctness to a trial court’s conclusions of law. *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is usually in a better position to judge credibility and weigh evidence but where evidence is introduced by deposition, the appellate court is in as good of a position as the trial court in reviewing and weighing testimony. *Landers v. Fireman’s Fund, Inc.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Total Disability Award and Credit

_____The first two issues deal with the finding the employee was totally disabled. It is the contention of the employee that his disability should be fixed as permanent partial disability since the evidence established that he was able to work on a part-time basis for his regular employer. This argument appears to be based on the fact the employee was 59 years of age when injured and could draw greater benefits if the award was being paid out over a 400-week period as opposed to terminating at age 65. The employer responds by contending the employee would not be able to find work in the open labor market with all of his injuries and conditions and he is really totally disabled.

In order to award total disability benefits, the evidence must establish the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. § 50-6-207(4)(B).

Many factors must be taken into consideration in determining whether an employee is totally disabled such as the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997).

When the employee was questioned as to his ability to work, he admitted he was not able to return to his last regular job of driving a truck or his previous employment as a painting contractor. He testified he thought he could work for some period of time at a desk job where he could move around and not be required to sit for long periods of time.

Dr. Stohler treated him for his rotator cuff injury and his lumbar injury and was of the opinion that he could do some work which did not involve lifting or overhead work. He said he could perform work at eye level, waist level or bench level activities and where he could change positions frequently. Dr. Hodges treated the employee for his neck injury and only opined he could not return to work as a long-distance haul truck driver. Dr. Enzenauer treated the eye injury and only said he was probably disqualified from operating a commercial vehicle.

Our review of the record indicates that in determining medical impairment and ability to work, each doctor was giving an opinion limited to the injury or injuries that he was treating. Opposed to this inquiry, the trial court in determining the employee's legal or vocational disability was looking at the larger picture reflecting the employee's ability to become employable in the open labor market upon the consideration of his multiple injuries and his pre-existing medical condition. We find it difficult to conclude the disability is only of a permanent partial nature when undisputed evidence shows the employee, a 62 year old high school graduate, has had two heart attacks, suffers from emphysema, has two ruptured discs in his neck, suffered a rotator cuff tear injury, a tear of the lumbar disc and practical loss of use of an eye.

The issue before the trial court was the extent of his permanent disability and not what method of computation would produce the greatest benefit. The mere fact the employee has returned

to work by the gratuitous act of his regular employer does not necessarily preclude a finding of permanent total disability as the real issue is whether the employee, in his disabled condition, is employable in the open labor market. *Tennlite, Inc. v. Lassiter*, 561 S.W.2d 157 (Tenn. 1978); *Skipper v. Great Central Insurance Company*, 474 S.W.2d 420 (Tenn. 1971).

We have closely examined the record and are of the opinion the evidence does not preponderate against the finding the employee is totally disabled in the open labor market.

Related to the total disability finding is a question of whether the temporary total disability benefits of \$10,342.46 should be allowed as a credit against the award of permanent total disability. The trial court allowed the credit and cited the case of *Lindsey v. Strohs Cos.*, 830 S.W.2d 899 (Tenn. 1992) as authority for doing so. We note that in this case the court was determining the credit question as to an injury which occurred on April 23, 1986 and under statutory language, Tenn. Code Ann. § 50-6-102(a)(7)(A)(Supp. 1986), that limited the employer's liability to the maximum total benefit of \$67,200. This monetary amount is no longer in the statute and therefore would not be applicable to an injury occurring in 1998.

With respect to the case before us, Tenn. Code Ann. § 50-6-102(13) provides:

“Maximum total benefit” means the sum of all weekly benefits to which a worker may be entitled; and

(A) . . .

(B) . . .

(C) For injuries occurring on or after July 1, 1992, the maximum total benefit shall be four hundred (400) weeks times the maximum weekly benefit except in instances of permanent total disability.

We find this definition of maximum total benefit sets a limit or ceiling on permanent partial disability awards of 400 weeks of benefits but exempts awards of permanent total disability. Since the statutory language has changed, we reverse the court in allowing the credit against the total disability award which is payable to age 65 years.

Attorneys' Fees

_____An issue is raised concerning the trial court's denying an allowance of attorneys' fees on certain unpaid medical expenses relating to the employee's eye injury. These expenses were for surgery and treatment in the sum of \$6,210.34 during December 1999 and \$4,801.26 for surgery and treatment during July 2000. The trial court allowed 20 percent attorney's fees on the general award of benefits but held counsel was not entitled to a fee on these unpaid medical expenses because at the beginning of the trial, it was stipulated that the charges were unpaid and that the employer was liable for payment of same. Counsel argues that prior to trial, the employer declined to pay the

expenses until it had an independent examiner to see the employee and satisfy the employer the eye injury was work-related.

In Tennessee, contested medical expenses are a part of the recovery or award on which attorney's fees may be assessed. *Langford v. Liberty Mut. Ins. Co.*, 854 S.W.2d 100 (Tenn. 1993); *Wilkes v. Resource Auth.*, 932 S.W.2d 458 (Tenn. 1996). We also note the statutory language of Tenn. Code Ann. § 50-6-225(a)(2)(A) provides that medical costs that have been voluntarily paid by the employer or its insurer shall not be included in determining the award for purposes of calculating the attorney's fee.

When this action was filed during June 1999, the employee had not even seen Dr. Enzenauer, the ophthalmologist, as his first visit was on September 29, 1999. The doctor testified he performed surgery during December 1999 and during July 2000. At some point in time, the employer chose to have an opinion from an independent examiner and after the examination was satisfied the eye injury was work-related. Under these circumstances, we cannot really see that a period of time actually existed where the employer's investigation of the facts shifted to a point indicating the liability for these expenses was contested. We hold the court did not abuse its discretion in declining to allow attorney's fees on these unpaid medical expenses.

Temporary Total Disability

Some additional temporary total disability benefits were stipulated at the beginning of the trial. The judgment did not reflect this stipulation and upon oral argument, the parties agreed to amend the judgment accordingly. We remand the case for that purpose.

Lump-Sum Awards

The trial court ordered a portion of the award be commuted to a lump sum but limited the commutation to 100 weeks of periodic benefits pursuant to the provisions of Tenn. Code Ann. § 50-6-207(4)(A)(ii). It was also ordered that attorney's fees be paid out of this lump-sum amount.

The record is very meager in support of the application for a lump-sum award. Counsel seemed to focus on a "special need" in order to qualify. An amendment to Tenn. Code Ann. § 50-6-229 in 1990 deleted the "special need" requirement and provided a lump-sum award could be granted when it was established the commutation was in the best interest of the employee and it appeared the employee could wisely manage and control the award. *Edmonds v. Wilson County*, 9 S.W.3d 106 (Tenn. 1999).

In *Edmonds* the court stated the main purpose of workers' compensation was to provide injured workers with periodic income as a substitute for lost wages and when there was no need for periodic payments to substitute for lost wages, commutation could be allowed upon establishing it was in the employee's best interest and that the employee could wisely control and manage the fund.

In the present case, the trial court did not make any findings as to the essential requirements of the statute and we are of the opinion the record is not sufficient for us to determine same. Therefore, we reverse the ruling commuting benefits to a lump-sum award in favor of the employee and remand this issue for further hearing and consideration.

As to the order commuting attorney's fees, we find that commutation may be allowed separate and apart from the employee's application. Tenn. Code Ann. § 50-6-207(4)(A)(ii); *National Pizza Co. v. Young*, 879 S.W.2d 817 (Tenn. 1994). In our view, this commutation need not be included in determining the employee's maximum commuted award.

The judgment of the trial court is affirmed as to the 100 percent award of permanent and total disability, the denial of attorney's fees on unpaid medical expenses and the commutation of a lump-sum award for payment of attorney's fees. The judgment is reversed as to allowing a credit against the total disability award and the commutation of benefits in favor of the employee. The case is remanded for the purpose of amending the judgment to allow additional temporary total benefits and for further hearing on the employee's application for commutation of benefits. Costs of the appeal are taxed equally to the parties.

ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by James Burks pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed equally to the parties, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING